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QUESTION OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Working Group on Arbitrary Detention

Addendum

Visit to Nepal

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Introduction

1. The Working Group on Arbitrary Detention, represented by its Chairman, Mr. L. Joinet, accompanied by the Group's secretary, visited Nepal at the invitation of that country's Government from 22 to 29 April 1996. It should be pointed out that, when the Working Group informed the Nepalese Chargé d'affaires in Geneva of its wish to travel to Nepal, its intention had been solely to visit the Bhutanese refugee camps in eastern Nepal in order to gain a better understanding, in the context of the follow-up visit to Bhutan which had been agreed with the Thimphu authorities, of the human rights implications of the situation there. In response, the Nepalese authorities had indicated that the Working Group would be free to visit the refugee camps, provided that the Government was not involved in any way in preparing or conducting such a visit, and furthermore proposed that the Working Group should at the same time visit the country within the framework of its mandate.

2. During its stay in Nepal, the Working Group met the Director General of the Prison Administration Department (Ministry of the Interior), the Assistant Inspector General of Police and the Attorney General (legal adviser to the Government), as well as the directors of the various prisons and places of detention visited. The Working Group also met the chief district officers of Morang and Jhapa, as well as judges of the district courts of Morang (in Biratnagar) and Gorkha.

3. In addition, the Working Group had fruitful meetings with members of the human rights committee of the Bar Association, convened by its chairman, and later with the President of the National Bar Association and with lawyers attached to the Supreme Court.

4. In Kathmandu, the Working Group visited the central prison (800 prisoners), the Bhadra Gol prison (400 prisoners) and the Dilli Bazar prison (162 prisoners), as well as the detention facilities of the "Hanouman Dhoka" police station. The Group also travelled to Gorkha, where it visited the local prison. At all those prisons, as well as in the police stations of the capital and provinces, the Group enjoyed great freedom of action: complete freedom of movement and freedom to choose which detainees to interview and where, the interviews being conducted solely in the presence of the delegation.

5. Regarding non-governmental contacts, the Working Group had meetings with numerous representatives of non-governmental organizations.

6. The Working Group also held two meetings with senior staff of the United Nations Development Programme (UNDP) and of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Kathmandu.

7. UNDP and the United Nations Information Centre provided the Working Group during its stay and travels with valuable assistance (logistics, interpretation, contacts), which greatly facilitated the mission.

8. Regrettably, however, the visit which the delegation had been due to make to places of detention in the Rolpa region (province situated in western Nepal), where a state of emergency has been in force since the establishment of a guerrilla base in the area, had to be cancelled because no flights were available owing to bad weather.

I. OBSERVATIONS BY THE GROUP ON THE CONDUCT OF CRIMINAL PROCEDURE: RULES APPLICABLE UNDER CURRENT LEGISLATION

9. When the police receive a petition or a complaint from a victim, or when an offence has just been committed, they record the case, institute an inquiry and carry out initial investigations to identify the person who committed the offence. If the offender is identified, the police have direct authority to issue an arrest warrant. Upon arrest, the person is placed in custody in police premises for a maximum period of 24 hours. Travelling time (sometimes as long as two or three days, owing to the Himalayan terrain) is not included in this period. The presence of counsel during custody is legally possible but not compulsory (and therefore infrequent). An indigent defendant is in principle entitled to assistance from assigned counsel. However, lawyers can intervene only after the case has been registered at the court office, and this excludes them de facto for the first 24 hours of custody.

10. With regard to aliens, there is provision for the assistance of an interpreter, who in most cases is supplied by the consulate.

11. It should be noted that arrests may be carried out by day or at night, with only a police warrant, except in the case of a house search, where the investigator must present a judicial warrant.

12. If more time appears necessary for the purposes of the investigation, the investigator must obtain authorization from the court. The application for an extension, which may not exceed 25 days in all, is submitted to the judge in the presence of the person being held in custody. In the event of grave disturbances of public order (attempt on the life of members of the royal family, terrorism, armed clashes, etc.), an extension may be granted by the chief district officer for a total of three months under the Public Offence Act.

13. For minor offences (public drunkenness), on the other hand, the extension may be decided by the police themselves, in which case it may not exceed a second period of 24 hours.

14. From the legal standpoint, the period of extension for a maximum of 25 days, being authorized under the supervision of a court, can be assimilated to detention pending indictment, whereas the three-month extension provided for by the Public Offence Act presents the characteristics of administrative detention, since it is ordered under the sole authority of the chief district officer.

15. When the police consider that the liability of the probable offender has been sufficiently established, the person is brought before the public prosecutor for his statement to be taken. After asking whatever questions may

be necessary, the prosecutor reads out the statement and then has it signed by the person subject to prosecution. The statement must be signed in the presence of the prosecutor.

16. The prosecutor may defer this formality and ask the police to carry out further inquiries.

17. If the period of 25 days has expired and the investigation must proceed, the public prosecutor prepares a motivated request for the extension of detention on the basis of the accusation maintained at that stage of the investigation. Once the investigation has been completed, the police make a final report and recommend to the prosecutor either that the person should be released, because of his innocence or for lack of sufficient evidence, or that he should be brought to court for trial.

18. The public prosecutor is not bound by the police recommendations when taking his decision. If he believes that there are sufficient grounds, he draws up a formal indictment and submits it to the court (or to the chief district officer, in exceptional cases, where that officer has power under the Public Offence Act). The public prosecutor (or the chief district officer, as appropriate) may decide either to remand the person in detention pending trial or to release him on bail until that date, provided that the penalty to which he is liable does not exceed three years; the amount of such bail must take account of the financial circumstances of the person concerned.

19. During the trial, the public prosecutor argues the case for the prosecution against the defence counsel. Under the rules of procedure, the party instituting the proceedings must have the final word, both in civil and in criminal cases. The public prosecutor is therefore the last to speak, unless he brings further charges or in the event of an appeal being lodged by the defendant. It should be pointed out that the assistance of counsel is not compulsory at any stage of the proceedings.

20. Both the defendant and the prosecutor may appeal, but only the defendant may appeal to the Supreme Court.

21. The Working Group wishes to emphasize therefore that, at both the constitutional and the legislative level, Nepal has gradually established a system governed by the rule of law which counts among the most advanced of the region: the former absolute monarchy has become a constitutional monarchy; at the political level, the multi-party system (art. 112 of the Constitution) and press pluralism are constitutionally protected; the right of association is recognized and non-governmental human rights organizations, even if they face some difficulties, enjoy a greater freedom to act and to report than in most neighbouring countries. While subject to the provisions of the national security law and the Public Offence Act, the rules of criminal procedure conform in the main to those set forth in the international human rights instruments. Lastly, the fact that by Act 2047 of 1990 Nepal has established the primacy of treaties over domestic laws and has ratified virtually all the main international human rights instruments is welcomed by the Working Group, which would like that to serve as an example to many other States in the region.

II. PROGRESS TO BE MADE AND GAPS NOTED IN THE IMPLEMENTATION OF LEGISLATION

22. While welcoming this significant advance in terms of principles, the Working Group considers that a second stage should follow with all efforts being mobilized to make these principles truly effective, lest in practice the rule of due process should ultimately, de facto, become the exception. This is a real risk but the situation remains controllable by virtue of the emergence, in the country's recent history, of a human rights culture, as evidenced, for example, in the discussion generated by the proposed establishment of a national human rights commission.

23. The main difficulties to be overcome concern the following areas.

24. Arrests and custody. The statutory 24-hour period of custody is not sufficiently observed, and the same holds for the 25-day maximum period prescribed for the initial stage of pre-trial detention, which is applied in a very uneven manner from one court to another. On occasion, according to detained persons interviewed by the Working Group, such arrests are made with no warrant, not even from the police.

25. Free legal aid and assistance of an officially appointed lawyer. The free legal aid provided for by the Constitution (art. 26, para. 14) is very infrequently given, either because potential beneficiaries are ill-informed or (and more especially) because of lack of funds. Officially appointed lawyers receive little, if any, remuneration. While the presence of counsel during custody is possible, the Working Group observed that it is not compulsory and noted instances where detainees had not received assistance from counsel for almost a year after their arrest.

26. Ill-treatment during investigation. While the prisoners seen by the Working Group very rarely reported ill-treatment in prisons, the same cannot be said for police detention centres. In the light of its inquiries into this matter, the Working Group considers that such dysfunctions are due primarily to the greater weight attached to confessions in the scale of evidence. This is probably one of the main reasons for the quite frequent cases of ill-treatment inflicted during investigations and, consequently, a source of judicial error. The police and judicial services could be sensitized to this important issue on the basis of the fact that Nepal has not only ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (although without having incorporated the corresponding legislation into its domestic law), but has also just approved a bill on compensation for victims of such practices. This is welcomed by the Working Group, which accorded great importance to the bill in its interviews with the authorities.

27. Conditions of application of the Public Offence Act. While the Working Group noted statistics according to which no one had been detained under the law on national security, i.e. as a political prisoner, it nevertheless found that the Public Offence Act, which in theory deals only with ordinary offences, was being applied in respect of offences obviously coming under the national security law. This redefinition, which is hardly consistent with the principle of the legality of offences and penalties, enables the authorities responsible for law and order to present some prosecutions in the statistics

as cases involving merely common crimes when they may, in fact, be of a political nature. This manner of applying the Public Offence Act seems to have become widespread in recent months in the western Nepalese province of Rolpa, where the guerilla base mentioned above is located.

28. Habeas corpus and states of emergency. While the Working Group was pleased to note, as emphasized by the Human Rights Committee (CCPR/C/74/Add.2, para. 11), that under the Constitution of Nepal habeas corpus is not derogable under any circumstances, several sources indicated that it was very difficult in practice to secure the protection or release of a person by habeas corpus when the Public Offence Act was applied.

29. Military courts. Significant changes would have to be made in the functioning of the military courts to make them compatible with the rules concerning the right to a fair trial provided for in article 14 of the International Covenant on Civil and Political Rights. It is abnormal, in the Working Group's view, that these emergency courts should:

(a) Be composed only of military personnel;

(b) Be able to try civilians who have committed offences against military personnel, whereas their jurisdiction should be confined strictly to offences under the military regulations committed solely by members of the armed forces;

(c) Be able to try offences committed by military personnel when the victims are civilians;

(d) Allow only for the military police to conduct investigations; and, in particular,

(e) Conduct their proceedings in camera as a rule, when sitting as courts martial, an aggravating circumstance being that the presence of counsel is not even authorized in such cases.

30. Forensic investigations. The Working Group was concerned by the fact that investigators are more often than not unable to obtain forensic expertise, especially in the provinces, even though proof of guilt in some cases may depend on it. The Working Group observed, for example, that in the absence of such expertise, heavy sentences appear to have been pronounced for infanticide in cases probably, not to say obviously, involving abortion - which, although punishable by law, none the less carries much lighter penalties.

31. Overcrowding in prisons for procedural reasons. The Working Group also found that continued pre-trial detention beyond the statutory period, often for excessive periods of time, causes overcrowding in some prisons, under conditions that fall well short of the principles set forth in the Standard Minimum Rules for the Treatment of Prisoners. Other main causes of overcrowding are that a sentenced person unable to pay a fine may be kept in detention, and that no provision is made in the legislation for judges to impose suspended prison sentences.

32. Records in places of detention. Monitoring of the lawfulness of the detention of persons deprived of liberty would require improvement and, in particular, standardization of the presentation and keeping of records in places of detention. These records should include all procedures to which persons taken into custody are subject (detention and the reason for it, time of travel, transfer, first appearance before a judge, appearance before the court for trial, disciplinary measures, release, etc.). Such monitoring can furthermore be expected to help reduce prison overcrowding.

33. Legislation concerning aliens. Regarding the status of aliens, the Working Group noted that limitations appear to be placed by the Constitution on the safeguards of human rights, which seem in part not to apply to non-nationals.

III. CONCLUSIONS

34. The Working Group's findings may be summarized as follows:

(a) The transition from an absolute and authoritarian monarchical system to a modern system of constitutional monarchy has been effected, enabling Nepal gradually to establish, at the normative level, a very advanced system based on the rule of law;

(b) While positive in terms of principles, the implementation of this legislation is problematic and slow, both because of the low standard of living of a large part of the population and because of the weight of previous practices and attitudes, which are slow to change in many areas concerned with law enforcement;

(c) It would seem that this handicap can gradually be overcome thanks to the dynamics of the new system governed by the rule of law and also to an emerging human rights culture, a factor which could be strengthened by intensifying the awareness of civil servants and officials responsible for law enforcement through human rights training, while at the same time showing a greater firmness towards State officials who infringe human rights in the performance of their duties, and making that approach known by example.

IV. RECOMMENDATIONS

35. In the light of the above comments, the Working Group recommends that the following measures should be taken:

Measures to reduce overcrowding in prisons and to monitor the lawfulness of detention

(a) Programmes of awareness raising and training of judges to ensure that the 25-day maximum period for the initial stage of pre-trial detention is strictly observed;

(b) Keeping of standardized records of persons received into custody in all places of deprivation of liberty;

(c) Introduction of suspended sentences for minor offences which are currently punishable only by terms of imprisonment;

(d) Prescription by the legislation of an appropriate legal remedy enabling a detained person to appeal to a court or other independent authority;

(e) Effective application of the practice of release on bail (having due regard for the economic situation of the person concerned), even when the applicable penalty exceeds three years;

(f) Measures to sensitize judges to the need, when imposing fines, to take into account not only the seriousness of the offence but also the financial circumstances of the person concerned;

Measures concerning the right to a defence

(g) Creation of a committee with the task of studying the reasons for, and suggesting ways to remedy, the dysfunctions noted in the provision of free legal aid and the remuneration of officially appointed lawyers;

(h) Effective provision for counsel to be present from the very first hours of custody;

(i) Adaptation of the functioning of the military courts to the standards concerning the right to a fair trial, by reviewing their composition so that, as a minimum, they are presided over by a civil magistrate, as well as ensuring that investigations are conducted by the civil judicial police, that in camera hearings become the exception, that the presence of counsel is assured in all circumstances and that the courts' powers are strictly limited to trying offences under the military regulations committed by members of the armed forces;

Measures against ill-treatment and torture

(j) Adoption of domestic legislative measures to incorporate the provisions of the Convention against Torture, to which Nepal has acceded, into national law so that persons who engage in torture can be prosecuted (and appropriate penalties imposed on those found guilty);

Measures concerning emergency legislation

(k) Reform of the Public Offence Act in order to furnish jurisdictional guarantees for the current three-month prolongation of detention that may be decided at the sole initiative of the chief district officer, an arrangement which at present confers on this form of detention an arbitrary character by reason of its exclusively administrative nature;

Measures to promote human rights

(l) Incorporation in the bill on establishing an independent national human rights commission of the principles relating to the status of national institutions for the promotion and protection of human rights adopted by the General Assembly on 20 December 1993 in its resolution 48/134.

36. In the view of the Working Group, priority should be given to implementation of measures (a) to (d), (f), (g), (j), (k) and (l).

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QUESTION OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Report submitted by the Working Group on Arbitrary Detention

Follow-up visit to Bhutan

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Introduction

1. The Working Group on Arbitrary Detention, represented by its Chairman/Rapporteur, Mr. L. Joinet, and two of its members, Mr. L. Kama, and Mr. K. Sibal, made an initial visit to Bhutan from 17 to 22 October 1994 at the invitation of the Government (see E/CN.4/1995/31/Add.3). At the end of that visit, the Group presented to the Bhutanese authorities, at their request - and the point is to be stressed - a memorandum containing a list of 15 recommendations. The Group was invited to return to the country to verify that its recommendations were being implemented. That visit, which took place from 29 April to 6 May 1996, was made by the Chairman/Rapporteur of the Working Group. In the meantime, through a communication dated 3 July 1995, the Bhutanese authorities had sent the Group a memorandum informing it of the first steps taken to implement some of the recommendations.

2. There were three dimensions to the follow-up visit: (a) to follow up on recommendations made by the Group during its first visit; (b) to visit courts, prisons and police stations not only in the capital, but also in the provinces, which it had not done during the first visit; (c) to evaluate a case on which the Group had declared the detention to be non-arbitrary, a decision which the interested party had asked to be reviewed.

3. During its visit to Bhutan, the Working Group was granted an audience with H.M. King Jigme Singye Wangchuck. During the course of interviews on follow-up to its recommendations, the Group held lengthy discussions with the Foreign Minister, Lyonpo Dawa Tsering; the Home Minister, Lyonpo Dago Tshering; and the Chief Justice, Dasho Sonam Tobgye, as well as with a group of Jabmis, substitutes for lawyers. The Group also met with the Chairman of the Royal Advisory Council, Dasho Karma Letho, and the Speaker of the National Assembly, Dasho Pasang Dorji. In addition, the Group visited two prisons in the capital which it had visited during its first mission: the Thimphu Detention Centre and the Chamgang Central Jail.

4. On 2 and 3 May, the Group went to Phuentsholing, Chukha District, and Samtse, in southern Bhutan, where it was received by the local authorities (Dasho Penjor Dorji, Chukha District Commissioner; Jigme Tsultrim, Samtse District Commissioner; and Doffu Reddy, Deputy Commissioner of Chukha District; it met with district court judges (including Thinley Thongmaith, Samtse District Court Judge, and Pema Gyelsthen, Phuentsholing Sub-Division Court Judge) and visited a prison (Samtse), where it met with the Police Chief, Major Dorji Phuntso. On 4 May, the Group visited Paro, in the west of the country, where it paid an impromptu visit to the police station. It was then received by the local authorities (Dasho Dophu Tshering, Paro District Commissioner; Sonam Tschering, Deputy Commissioner of Paro District; and Kunzang Tobgay, Paro District Court Judge).

5. It also held a long working meeting with the Resident Coordinator of the United Nations Development Programme (UNDP) in Bhutan, Mrs. Akiko Naito-Yuge.

6. In all the prisons or police stations visited, some of them in an impromptu fashion, the Working Group was able to question freely and in private, in a place of its choosing, as many detainees as it wished.

7. The main objective of the Working Group's initial visit, in October 1994, had been to draw up, at the request of the Bhutanese authorities, an inventory of existing problems in the administration of justice and to make recommendations thereon.

8. The objective of the present "follow-up" visit - which was again made at the request of the Bhutanese authorities - was therefore to ensure implementation of the recommendations made by the Group during the previous visit.

9. The following will therefore be considered in succession:

(a) Steps taken, according to the Government, to ensure the implementation of the recommendations made by the Working Group during its first visit;

(b) Observations by the Group on progress made in the administration of justice;

(c) Initiatives for strengthening the implementation of the recommendations.

10. The Working Group would like to express its gratitude to the Bhutanese authorities for the help and cooperation extended freely and efficiently to its members throughout their visit and for the spirit of cooperation which the State officials constantly showed at all levels.

I. STEPS TAKEN, ACCORDING TO THE GOVERNMENT, TO ENSURE THE IMPLEMENTATION OF THE RECOMMENDATIONS MADE BY THE WORKING GROUP DURING ITS FIRST VISIT

11. It will be recalled that, following its first visit, the Working Group, in consultation with the Bhutanese authorities, proposed a set of 15 recommendations. On the instructions of the King, the administrations concerned had been invited to plan the implementation of those recommendations, and the Working Group invited to make a follow-up visit in order to evaluate the resulting implementation.

12. The steps taken in that regard by the Government and by the High Court were set out in two detailed memoranda given to the Group during its second visit, which contain the following replies.

13. Recommendation 1: A review should be conducted by an independent body, constituted by the Government, of all cases of persons detained under the National Security Act, 1992, in order to determine that those who are not terrorists and against whom there is no evidence should not be either formally charged or tried.

14. Government: The cases of all detainees were reviewed by representatives of the Royal Bhutan Police and the Home Ministry. The matter was then brought to the attention of the Lhengyel Shungtshog (Cabinet), on the instruction of His Majesty the King, on 31 October 1994. Accordingly, the High Court was directed to set aside all common law cases for a period of six months and

concentrate on expediting the trial of anti-national cases. This information was communicated by the Home Minister in his letter No. GA(9)-14/94/728 dated 2 November 1994, addressed to Mr. Kapil Sibal. As a result all the detainees have either been released or tried and convicted by the High Court.

15. Recommendation 2: After the review is conducted and innocent persons identified, those prisoners against whom substantial evidence exists should be formally charged within a specific time-limit.

16. Government: As stated above, necessary action has already been taken and there is no detainee yet to be charged. A total of 19 detainees in Chamgang Central Jail were granted amnesty by His Majesty the King on 26 December 1994 and 14 February 1995. This information was communicated by the Home Minister in his letter No. GA(4)-19/95 dated 3 July 1995.

17. Recommendation 3: All those formally charged under the National Security Act, 1992, should be tried within a specific time-limit.

18. Government: This recommendation has been implemented. The trials of the anti-national detainees in Chamgang Central Jail during the visit of the Working Group in October 1994 and other anti-nationals arrested subsequently have all been completed.

19. High Court: This recommendation was brought before the Cabinet, which decided that anti-national cases should be given priority and expedited. The Chief Justice, however, pointed out to the Cabinet that all existing common law cases registered in the High Court would have to be set aside and registration of new cases would have to be suspended if the anti-national cases were to be expedited. The Chief Justice also apprised the Cabinet that suspending cases that have already been registered in the High Court and not accepting new cases would be a contravention of the Thrimzhung Chhenpo. His Majesty the King issued a special directive to set aside all common law cases for a period of six months and concentrate on expediting the trial of anti-national cases. The Royal Court of Justice completed the trial of all those who had been charged as stated above and awarded judgement. The order to set aside common law cases was not in keeping with the Thrimzhung Chhenpo. The Royal Court of Justice has recommended that the issuance of such executive orders should not be repeated in the future.

20. Recommendation 4: The prison authorities must ensure that all persons being tried are aware of the institution of the Jabmi and are represented by a Jabmi of their choice.

21. Government: It has always been a practice in the High Court to permit the accused to engage a Jabmi of his choice. It is a principle enshrined in the Thrimzhung Chhenpo (sect. DHA 3-10) and Resolution No. 10 of the fifty-fifth session of the National Assembly. In keeping with this principle, persons being tried are also being made aware of the institution of the Jabmi by the prison authorities and by the courts as a matter of practice.

22. High Court: Persons being tried are always adequately made aware of the institution of the Jabmi through the preliminary hearing. It is an established procedure in the Court. The provision of Jabmi is enshrined under section DA 3-10 of the Thrimzhung Chhenpo and Resolution No. 10 of the fifty-fifth session of the National Assembly.

23. Recommendation 5: Some form of assistance should be provided to the accused for representing their cases before the High Court since many of them do not seem to be adequately possessed of the qualities needed to represent their own case. They should be provided Jabmis of their choice.

24. Government: As per existing practice, a defendant is given the choice of taking the assistance of a Jabmi. The provision of engaging a Jabmi is explained during the preliminary hearing. This provision is contained in subparagraph 1.1.8. of the court procedure. The court procedure is also covered in the draft on civil and criminal court procedures.

25. High Court: The accused persons are informed of their right to have their case defended by a Jabmi of their choice, if they desire. The procedure of the Royal Court of Justice requires it to inform every person being tried about the institution of the Jabmi. The Royal Court of Justice follows this practice during the trials. The draft on civil and criminal court procedures has incorporated the Jabmi system more elaborately. To disseminate this information and create public awareness, and in keeping with the recommendation, the Royal Court of Justice conducted a month-long training workshop on Jabmi from 29 February to 26 March 1996 that was attended by 72 Jabmis. This was aimed at strengthening the age-old Bhutanese tradition of the Jabmi system.

26. Recommendation 6: All detainees who have not yet been convicted under the National Security Act, 1992 should be produced before the High Court periodically and be given the right personally to state any grievances they may have before a judge.

27. Government: This has been implemented.

28. High Court: The Royal Government of Bhutan has implemented this recommendation. All detainees who were not convicted under the National Security Act, 1992 were produced before the High Court periodically and they were given the right to state any grievance before a judge.

29. Recommendation 7: All common law prisoners should be regularly produced before a judge and given the assistance of a Jabmi.

30. Government: All common law prisoners are being produced before the Thrimkhang and have access to the assistance of a Jabmi. It may be noted that, in keeping with His Majesty the King's command, a legal course for Jabmis was conducted from 29 February to 26 March 1996.

31. High Court: Every common law prisoner is regularly produced before a court of law and informed about the institution of the Jabmi and given the assistance of a Jabmi according to his/her choice. The one-month Jabmi training course was intended to popularize the Jabmi system so that the public at large would resort to the assistance of Jabmis.

32. Recommendation 8: Those common law prisoners who have been detained for years without having been brought before a judge and who have not been formally charged should also have their cases reviewed by an appropriately constituted body to consider whether it is at all necessary to prosecute them.

33. Government: This recommendation has been implemented as stated in letter No. G(4)-19/95 dated 3 July 1995: "The status of common law prisoners, i.e. whether charge-sheeted, brought before a judge, under trial and convicted, was reviewed by the High Court (and the Royal Bhutan Police) after the visit of the Working Group. As a result of the review, the cases of eight common law prisoners, six of whose cases had not been heard at the time of the Working Group's visit, were expedited and the eight persons were subsequently released. In addition, a total of 56 non-national convicted common law prisoners were released or handed over to the Indian Police."

34. Recommendation 9: Those who have been detained for years without having been formally charged or produced before a judge should be entitled to be released on bail and the conditions of bail should relate closely to their economic condition.

35. Government: This recommendation has been carried out as stated in letter No. G(4)-19/95 dated 3 July 1995: "Based on the review of the status of common law prisoners following the visit of the Working Group, the cases of eight common law prisoners were expedited and they were subsequently released. There are now no old cases that have not been charge-sheeted or produced before a judge. The procedure for new cases has been speeded up in the district courts. Hearing of new cases and trial of existing cases in the High Court are at present on hold because of the priority given to anti-national cases. The system of bail does not exist in Bhutan. However, taking into account the financial condition of the common people, in cases of offences that are compoundable, a person can be released if any upright citizen undertakes to stand surety on his/her behalf." The provision for release of an accused in the event of surety stood by any upright citizen is enshrined in sections DHA 3-1, 3-2 and 3-10 of the Thrimzhung Chhenpo.

36. High Court: This recommendation has been implemented. Nineteen of them were granted amnesty by His Majesty the King.

37. Recommendation 10: All accused against whom there is a claim for money should not be prosecuted and the claimant should be entitled to proceed for recovery of monies as a civil claim. All such accused should be released forthwith.

38. Government: This recommendation has been clarified, as stated in letter No. GA(4) 19/95 dated 3 July 1995: "Due consideration has been given to this recommendation. All monetary claims are dealt with in keeping with the Loan Act, 1981. Decisions on all such claims brought to court are passed

in keeping with this Act. As per clause NGHA 4-17 (KHA) of the Loan Act, claims against those persons who are physically unable to repay them are ruled by the court to be written off, even if such claims are found to be genuine. However, any other person against whom a claim is found to be genuine but who refuses to repay the claim as per the decision of the court is liable to imprisonment for refusing to abide by the decision of the court. The main difficulty faced by the Royal Government of Bhutan in implementing the recommendations has been the inconvenience caused to persons involved in common law cases. Although the district courts are not affected by the special priority given to expediting anti-national cases, all existing common law cases in the High Court have been suspended and new cases have not been heard since the Cabinet decision on 31 October 1994. The other difficulty is the acute shortage of qualified manpower faced by the judiciary and law enforcement agencies."

39. High Court: The litigation arising from monetary claims is dealt with according to the Loan Act, 1981. The Royal Government is in the process of amending the Loan Act and is preparing a draft keeping in mind the aforesaid recommendation. The draft will be submitted for the consideration of the Cabinet following which it will be submitted to the National Assembly for enactment.

40. Recommendation 11: The Code of Criminal Procedure as applicable in Bhutan should incorporate a provision which requires the investigating authorities to complete their investigation within a maximum period of time as may be stipulated in the Code. In this regard, it may be noted that in India the investigating authorities are entitled to a maximum period of 60 days for completion of investigation into all offences which are not punishable with imprisonment for life. In all cases punishable with imprisonment for life the maximum period within which the investigation should be completed is 90 days. Failure to complete such investigation entitles the accused to be released on bail. Such a provision may, with appropriate modifications, be incorporated in the Code of Criminal Procedure applicable in Bhutan.

41. Government: At present the Code of Criminal Procedure as applicable in Bhutan is silent on the minimum period for completion of investigation into all offences. As a matter of practice, efforts are being made to expedite investigations within reasonable time-limits, barring exceptional cases where investigations are delayed owing to constraints of qualified staff, verification of evidence and the process of producing witnesses. The Government is considering a draft on civil and criminal court procedures which provides the need for a minimum/maximum period for completion of investigation into all kinds of offences.

42. High Court: The draft on civil and criminal court procedures is under consideration by the Cabinet following which it will be submitted to the National Assembly for enactment, and the above recommendation is incorporated in the draft code.

43. Recommendation 12: Every accused should be produced before a magistrate within 24 hours. Though there is such a law in Bhutan, inquiries have revealed that it is not followed either in letter or in spirit in most instances. A review body could be set up to monitor adherence to such

procedure and the judge be given powers to investigate all matters in which the accused complains that he was arrested and not produced before the magistrate within 24 hours.

44. Government: Bhutanese law, under provision OM of the Thrimzhung Chhenpo, provides equal justice for all persons before the law. In keeping with section 30 of the Police Act, 1980, concerted efforts are being made to ensure that every accused person is produced before a magistrate within 24 hours. In this regard, it may be mentioned that law enforcement officers have time and again pointed out the difficulties of producing every accused person before a magistrate or court of law within 24 hours, owing to the remoteness of some of the villages and the time needed to bring the accused to the district court, and when the accused are apprehended during weekends and national holidays when all the offices are closed. Any accused/detainee is free to lodge a complaint, if any, at his own discretion or with the help of a Jabmi, before a court of law or even to His Majesty the King (Thrimzhung Chhenpo, chap. 11, sect. DHA 1-8).

45. High Court: According to section 30 of the Police Act every accused should be produced before a magistrate (Thrimpon) within 24 hours. The courts interpret the law and shall take the necessary steps if the provisions of law are violated and brought to the notice of the court. The Jabmis have been briefed accordingly during the training workshop.

46. Recommendation 13: The law must also provide that every accused is physically produced before a judge periodically, so that the judge concerned assures himself of the well-being of the accused. Such a procedure will also give an opportunity to the accused to state such grievances as he may have when produced before the judge.

47. Government: In keeping with the principle enshrined in section DHA 2-2 of the Thrimzhung Chhenpo, all detainees are required to be produced before the court as and when summons are received. All detainees may appeal to the Chief Justice in person during the "Miscellaneous Hearing". The convicted prisoners can also appeal against the judgement within 10 days of the court verdict.

48. High Court: The cases of the detainees who had not yet been tried during the Working Group's visit have been tried as recommended. Amnesty was granted to 19 of them and trials of all the others have been completed. As stated above under recommendation 10, litigation arising from monetary claims is dealt with according to the Loan Act, 1981. Further, the Royal Government is in the process of amending the Loan Act and is preparing a draft keeping the aforesaid recommendation in mind.

49. Recommendation 14: A complete list of all occupants of Thimphu Detention Centre and Chamgang Central Jail at the time of the visit of the Working Group should be prepared to indicate the following:

(a) Name of prisoner;

(b) Date of arrest;

(c) Date when first produced before the magistrate;

(d) How many times thereafter he was produced before the magistrate, giving dates;

(e) Date when he was formally charged;

(f) Date when the trial began;

(g) Was he defended by a Jabmi or did he defend himself;

(h) Date of conviction.

50. Government: The recommendation of the Working Group has been implemented.

51. Recommendation 15: All the above recommendations, wherever applicable, except for recommendation 14, should be applied to all prisoners in all jails within Bhutan.

52. Government: All recommendations of the Working Group on Arbitrary Detention have been carefully reviewed and implemented as reflected in the foregoing paragraphs. Besides, the Government is also considering a draft on civil and criminal court procedure which covers issues that have been raised in the Working Group's recommendations. In keeping with recommendation 3, the High Court had been directed to set aside all common law cases for a period of six months and concentrate on expediting the trial of anti-national cases. Though concerted efforts were made, the trial of anti-national cases could not be completed within the recommended time-frame of six months from the day of visit of the Working Group. As a result an extension of the mandate had to be given to complete the cases.

II. OBSERVATIONS BY THE GROUP ON PROGRESS MADE IN THE ADMINISTRATION OF JUSTICE

53. Efforts focused on attempts to observe, in practice, the rules of criminal procedure. From the initiation of proceedings to the judgement and sentencing, the procedure is now as follows:

(a) Arrest and custody. When the police are alerted - either by a complaint from the victim, by public initiative such as a petition or by hue and cry, in the case of a flagrant offence - they undertake the questioning and then issue a warrant authorizing the person to be placed in custody for a 24-hour period reckoned from the time of arrest. The person is then taken to the appropriate police station, where the preliminary investigations are conducted (questioning of the arrested person, the victim and the witnesses, search for evidence and so forth). At the end of that initial phase, the police file a preliminary indictment in the form of a report;

(b) First appearance before the judge. The police take the person before the judge and present the preliminary indictment. The judge may order either:

(i) Release, if he believes that there are insufficient grounds, or none at all, for the charge (innocence established); or

(ii) Continued detention, if an additional period seems necessary to conclude the investigation. This extension is decided at the initiative of the judge or, more frequently, at the request of the police, who must then back up the request with concrete evidence;

(c) Rights of the defence. From this stage onwards, the detainee may in principle be assisted by a defender Jabmi (or Jamani) unless he states that he wishes to defend himself or to be assisted by a friend or a member of his family. The Jabmi is generally a person qualified to carry out this function because of his experience and wisdom, although, since this is not a permanent position, he continues to pursue his own occupation;

(d) Close of the investigation. When the investigation is completed, the police draw up the indictment. They hand it over to the court when they bring the accused before the judge, and then withdraw. The police are not present during the hearing, and the institution of public prosecutor exists only at the level of the Supreme Court, known as the "High Court". The judge reads out the indictment and then conducts the proceedings and, as appropriate, hands down a decision either to release the accused (innocence established, or insufficient evidence) or to impose a sentence. If the accused appeals, he is transferred from the police station to the district prison while awaiting his hearing;

(e) Appeals procedure and appeal to the High Court. The procedure followed before the District Court of Appeals is largely identical to that just described. The procedure before the High Court, on the other hand, requires additional explanations. This court of highest jurisdiction, the number of whose judges has just been raised from six to eight, rules not only on law but also on fact. It can pronounce itself both on the merits of the evidence or guilt and on how correctly the law is being enforced. It is furthermore directly and solely competent for judging perpetrators of offences under the National Security Act. The case for the prosecution is argued by a public prosecutor. The rest of the procedure is not particularly unusual. As a last resort, a convicted person may always ask H.M. the King for a pardon. Amnesty may also be granted collectively to a particular category of convicted person, by royal decision. The most recent amnesties were granted on the occasions of the national holiday, the New Year and the King's birthday.

III. INITIATIVES FOR STRENGTHENING THE IMPLEMENTATION OF THE RECOMMENDATIONS

54. Although most of the difficulties encountered in implementing the recommendations have been overcome, some remain. They were the subject of an agreement with the authorities concerned, as follows:

(a) To adjust the length of police custody (24 hours) to travel problems. Almost all the police officers and judges interviewed especially in the provinces, drew the attention of the Working Group to the impossibility of respecting the 24-hour custody period owing to the remoteness of many villages, a fact compounded by the Himalayan terrain and the scarcity of telephones in the rural areas. The information gathered by the Group shows the scale of the problem. In Samtse, for example, the most remote villages are accessible only by foot; the journey takes six days round trip, to which must be added the previous three-day journey needed for the villagers to alert the police. In order to shorten the length of time involved, the peasants, when possible, travel by foot for one or two days to the closest government office, which generally has a telephone line. In Gasa (Punakha district), for example, and in Lhuntshi district, the journey can take six or seven days one way. In practical terms, the following procedure is generally followed:

(i) The men, gathered by the village Chief, arrest the person against whom charges will be brought. Under the protection of the Chief, the person is placed in a confined space while waiting to be taken into police custody;

(ii) One or two messengers are sent to alert the police;

(iii) On their arrival, the police conduct the preliminary investigations (including questioning and collecting testimony, evidence and exhibits). If they believe the accusations to be unfounded or inadequate, they release the individual. If not, they escort him to the police station. The normal procedure then continues (indictments, appearance before a judge, etc.).

The Working Group's proposed solution is to calculate the 24-hour custody period (which runs from the arrest) from the person's arrival at the police station, as long as the length of the journey is specified in the up-to-date register of the detainees' legal status, which each detention centre has now begun to keep.

(b) To provide clearer guidelines on how custody may be extended. As noted by the Working Group, the police often have to ask the judge to extend custody beyond 24 hours to meet the demands of the investigation. It seemed to the Working Group that several criteria should be specified so that the judges can make their professional practice consistent and ensure effective monitoring. Some of them grant an extension without specifying the length, some call for limited but renewable periods, and still others - a minority - seem quite willing to impose fixed lengths. It is proposed that in the texts, limitations should be envisaged and conditions for a possible renewal stipulated (for example, proof), in order better to distinguish between custody following arrest and detention pending trial;

(c) To make the penalty system more flexible. According to law, the judge may pronounce only a prison sentence, even for minor misdemeanours and first offences. He may not suspend a prison sentence nor substitute a fine for imprisonment, except in the case of minors. The only possibility is to reduce the sentence to the minimum imprisonment called for by law. Based on

the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), alternative measures should be considered, such as suspended sentences and probation. The possibility of suspending sentences seems to be desired by many judges, firstly because of its deterrent and therefore preventive effect (if the accused repeats his offence, he must serve the first and second prison terms non-concurrently; and secondly, in order to avoid the risk of overcrowding in the prisons. If fines were to be allowed for the same reason, the law should stipulate that the judge must take into account the standard of living of the convicted person. The Government does not rule out the possibility of such provisions being introduced in the draft reform of the Code of Criminal Procedure. A similar initiative could be envisaged while a sentence is being served, based on probation: a prisoner who has been on good behaviour and who shows a clear willingness to re-adapt can, after serving a significant part of his term (for example, at least one half), enjoy a measure of freedom, as long as he fulfils certain obligations (for example, not frequenting a given place or person, reporting periodically to the police, or compensating the victim. Such an initiative could also be taken as part of the draft reform of the Criminal Code;

(d) To strengthen the role of the Jabmi as defender. The Working Group noted that the function of lawyer stricto sensu does not exist as such in the Bhutanese legal system, as the role of defending the accused (or victim) is played by a Jabmi (see paras. 21, 22, 53 (c) above), a traditional Bhutanese institution. The Working Group believes that this tradition should be used as a basis for allowing the institution of Jabmi progressively to develop into that of lawyer. To that end, bearing in mind the present situation, the Working Group has made the following observations:

(i) The institution of Jabmi appears to be insufficiently known by the people. The function should therefore be popularized as long as there are enough candidates to meet a growing demand, if one arises. Based on the registers of the status of detainees in the Thimphu District Prison (52) and the Chamgang Central Jail (153), none of them has been assisted by a Jabmi. All of them defended themselves, sometimes with the help of either parents or friends;

(ii) If the function of Jabmi demands experience and wisdom above all, the modernization of the legal system undertaken by the authorities will increasingly require that Jabmis improve their legal training. An early and laudable initiative has been taken in this regard by the Chief Justice, who organized a training seminar for them. A call for candidates was launched nationwide. Of approximately 100 candidates, 71 Jabmis were selected to take part in this first further training course.

The Working Group, which met at length with a group of interns noted the exceptional interest of the Jabmis in this initiative, which they hoped would be repeated, and which the Working Group can but commend.

IV. CONCLUSIONS AND FINAL RECOMMENDATIONS

A. Conclusions

55. Following the two invitations by the Royal Government of Bhutan (on-site and follow-up visits), the Working Group notes that the 15 recommendations it made in October 1994 have generally been implemented.

56. Almost all the cases of detention considered by the Working Group during its October 1994 visit to be irregular or arbitrary have been rectified.

(a) Innocent persons, or those against whom there was insufficient evidence, have been released;

(b) Those who had been in prison for a long time without being brought promptly before a judge have all been taken before a judge and then either released or put on trial; that measure, which was initially applied to about 300 detainees in the Chamgang Central Jail under the National Security Act, has subsequently been extended to all categories of detainees, as recommended by the Group;

(c) Nineteen of those sentenced under the National Security Act have been granted an amnesty by royal decree;

(d) New cases have been dealt with according to the same rules, namely:

(i) Appearance before a judge within the 24 hours called for by law or at least promptly where practical difficulties arise, and for those in remote areas within a reasonable period of time considering the travel problems caused by distance, lack of roads or the terrain;

(ii) Judgement rendered within a reasonable period of time.

57. The prison registers, regularly updated, are using the various headings proposed by the Working Group in its recommendation 14 (name of prisoner, date of arrest, date when first produced before the magistrate, date when he was formally charged, number of appearances and audiences, date and length of sentence, date of release, whether or not assisted by a Jabmi). In some detention centres the Group even noted that the register was labelled "Working Group Register", in reference to recommendation 14, which was made by the Group during its first visit.

58. In addition, such registers are also being maintained in the police stations as regards the various stages of the preliminary investigation. They have greatly facilitated the work of the Group, enabling it to have both an individual and a global vision of the legal aspects of detention for each establishment. This explains why the main purpose of the meetings with prisoners was to ensure, through interviews, the veracity of the information appearing in the registers. No significant irregularities were noted.

59. During the meetings with each detainee, which were totally private and were held at a place chosen by the Group at the last minute, two related

questions were asked in order to verify whether there had been any major transfers of detainees in the days preceding the Group's visit and whether the prisoners had been the victims of ill-treatment at one time or another during the proceedings. Although the last question is not directly part of the Group's mandate, the Group conducted a survey and would, if necessary, have brought the findings to the attention of the Special Rapporteur on torture. The responses were negative on both points (the only two cases of alleged ill-treatment recorded in the south of the country concerned the Indian border police, just before handing the detainee over to the Bhutanese authorities, a procedure which is a part of border police cooperation agreements).

60. Debtors' prison. According to the High Court, the Government is preparing a draft reform of the Loan Act, 1981 following the lines suggested by the Working Group in its recommendation 10 ("all accused against whom there is a claim for money should not be prosecuted and should be released forthwith"). The draft law will shortly be submitted to the Cabinet and then to the Bureau of the National Assembly with a view to its adoption.

61. Recommendations 4 and 7, on prisoners being able to receive assistance from a Jabmi of their choice, are the most difficult to implement, mainly for practical reasons: there is an inadequate number of Jabmis, and for the most part they are still lacking any in-depth legal training and, as previously indicated, are carrying out this function in addition to their main occupation. Aware of this difficulty, in order to begin implementing recommendations 4 and 7 the Bhutanese authorities organized a Jabmi training and recruitment programme (see para. 25 above), which was held at the High Court from 29 February to 26 March 1996.

62. The Working Group wishes once again to thank the Bhutanese Government for the excellent conditions of cooperation surrounding the two visits, and for having taken the initiative for the follow-up visit, since, to the knowledge of the Working Group, this was the first time that a Government itself had requested such a visit. The Working Group recommends that the Commission on Human Rights should encourage Governments to follow the example of Bhutan by requesting follow-up visits.

B. Recommendations

63. In the light of these conclusions, the Working Group makes the following recommendations:

(a) Recommendation 1: The draft law reforming the Code of Criminal Procedure should be adopted as early as possible; the Code should contain the following proposals cited above (cf. para. 54):

(i) Travel time should not be taken into account in calculating the 24-hour custody period, the starting-point of which should be considered to coincide with the arrival of the arrested person at the police station. On the other hand, this period should be specified in the registers kept in the detention centres;

(ii) Non-custodial alternative measures, such as suspended sentences and probation, should be available, based on the Tokyo Rules (see para. 54 (c) above);

(b) Recommendation 2: The technical cooperation programme in the field of the administration of justice, which was agreed in principle between the Bhutanese authorities and the Centre for Human Rights, should be implemented, and high priority should be given to the question of the training of judges and of Jabmis, whose function is insufficiently known to the public;

(c) Recommendation 3: To the extent possible, Jabmis should be officially appointed to assist persons who lack financial means.